Filed 2/24/09 In re Marriage of Hardesty CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of JENNIFER and REX HARDESTY.	
JENNIFER HARDESTY, Respondent, v. REX HARDESTY, Appellant.	G039105 (Super. Ct. No. 93D00499) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Richard G. Vogl, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Law Office of John A. Tkach and John A. Tkach for Appellant.

Law Office of Milo F. De Armey and Milo F. DeArmey for Respondent.

Rex Hardesty appeals from an order modifying the amount of child support he is obligated to pay for his two children. He contends the court erred in ordering him to pay $1,561 per month, despite the fact that based upon his earned income, the applicable California "guideline" amount was only $704.

Although the court accepted Hardesty was not a credible witness, it also accepted that his current earned income was as reflected in his income and expense statement. Using that amount, the court calculated a "guideline" amount of $704 in child support. However, the court also noted that Hardesty owned the home in which he lived, free of any mortgage, and the court expressed the belief Hardesty had elected to retire that mortgage, rather than invest in income-producing assets, as part of a plan to "insulate himself from liability for child support." Based upon that conclusion, the court "imputed" $2,769 in additional monthly income to Hardesty, an amount equal to the monthly mortgage obligation owed on the house back in 1993, when the parties were still married. With that imputed income added to Hardesty's earned income, his "guideline" child support payment jumped to $1,561 per month.

We reverse the order. Hardesty's freedom from his former mortgage obligation is not a proper basis for imputing income. Although it may be true Hardesty invested discretionary funds into the early retirement of his mortgage – funds which might otherwise have been invested in a manner that generated income – our record simply provides no *evidence* to support such a conclusion.

Additionally, the court erred in characterizing (1) the fact Hardesty had no visitation with his children, and (2) the conclusion that the parties' son was in need of "counseling," as "special circumstances" warranting a departure from the guideline support amount.

The relative amount of time each parent spends with the children is included within the basic guideline support calculation, and thus Hardesty's lack of visitation cannot be treated as a factor which falls outside that figure. Moreover, the

court's apparent belief the parties' son is *currently* in need of counseling is unsupported by any evidence, and its reliance on that factor as a basis for increasing child support appears inconsistent with the fact the court's order explicitly apportions the majority of support to the parties' *daughter*.

The order is reversed.

FACTS

Hardesty and Leva[1] were married in 1988. They have a son who was born in 1991, and a daughter born in 1992. Leva petitioned for divorce in 1993. Although the parties initially shared custody, Leva filed an order to show cause seeking a modification of the custody arrangement in 2002. She reported that both children were experiencing great stress in connection with their visits with Hardesty, and both were reluctant to continue the visits. She alleged Hardesty's home contained inappropriate artwork and other items, and that he sometimes treated the children inappropriately when they visited.

Most disturbingly, she related the parties' elder child, a son, had sought to harm himself in what was believed to be a suicide attempt in March 2002, when he was 11 years old. Leva believed the attempt was related to the son's stress over visitation with Hardesty.

In response to the petition, the court issued a tentative decision on April 11, 2002, requiring that all visitation between Hardesty and the children be monitored, and that Hardesty participate in both parenting classes and therapy. That tentative decision was not, however, reduced to a formal order until February of 2007.

In the interim between the 2002 tentative decision and the 2007 formal order, Hardesty apparently had no visitation with his children. He did, however, pay his child support obligation, in the amount of $600 per month, in a timely fashion.

[1] Jennifer Hardesty has since remarried and is now Jennifer Leva.

In October of 2006, Leva filed an order to show cause requesting that the court grant her sole legal and physical custody of the children, and modify the child support order.[2] She estimated Hardesty's current gross income to be $10,000 per month.

In response, Hardesty filed a declaration agreeing to both the sole custody request and an order for guideline support. Hardesty's income and expense statement reflected his current gross income was $2,352 per month, and his most recent tax return supported that claim.

At the commencement of the hearing on the order to show cause, Hardesty represented to the court that he was not planning to exercise any visitation rights with the children. He stipulated that Leva would have sole physical and legal custody.

The court then proceeded with the hearing regarding child support. Leva called Hardesty as a witness. He was stunningly uncooperative, refusing to recognize any documents and claiming not to know or recall his income, his property holdings, the value of his house, the date he paid off his mortgage, or what his mortgage payments had been prior to satisfaction of the mortgage balance. He also claimed not to recall whether he had visited Europe during the last five years or the last 10 years, although he acknowledged he had been there.[3] The court then terminated Hardesty's testimony, noting he had "no credibility" and the continuation of the testimony was "doing us no good."[4]

Leva then testified. She stated that after the divorce, Hardesty continued to reside in the home they had shared during the marriage. At the time of the divorce (in 1993), he owed about $300,000 on the mortgage. Hardesty paid off the mortgage on the home in approximately 2002. Additionally, Leva was aware that Hardesty had built a substantial addition to the house, of approximately 2000 square feet, at some point

---

[2] The order to show cause also raised other issues not relevant to this appeal.

[3] This attitude was merely a continuation of similar conduct during Hardesty's prehearing deposition.

[4] Hardesty has gone to extraordinary lengths to try to lose this case. So far he has failed.

between 1993 and 2002. Finally, Leva testified that Hardesty had traveled to Europe several times per year during the period in which they were actively sharing custody of the children. She was aware of the frequency of these trips because he would send her emails which included his address and telephone number in Europe.

At the conclusion of the hearing, the court took the matter under submission, and issued a written "decision" later that same day. In its decision, the court expressly concluded Hardesty was not credible, but then expressly credited his claim – at least for purposes of computing a "guideline" amount – that his current earned income was $2,352 per month. Despite the fact that Hardesty's earnings in 2006 were significantly less than he had made in earlier years, the court made no finding that his earnings were artificially low, or that he was intentionally depressing his earned income. To the contrary, the court appeared to credit Hardesty's claim that he had been involved in some sort of accident in 2003. Hardesty asserted that the effects of this accident impacted his ability to earn a living at the level he had done previously.

The court then explained it intended to award support in an amount higher than the guideline number generated by Hardesty's earned income. First, the court found Hardesty had "attempted to insulate himself from liability for child support by paying off his realty mortgage, and so the court believes that it would be in the best interests of the children to impute income." The court noted that a "parent cannot shirk the obligation to support his or her child by underutilizing income-producing assets. Thus, where the supporting party has chosen to invest his or her funds in non-income-producing assets, a trial court has discretion to impute income to those assets based on an assumed reasonable rate of return."[5] The court then determined that a reasonable rate of "return" on this theoretical alternative investment was the amount Hardesty had previously been

[5] Under section 4058, subdivision (b), "[t]he court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children."

paying for his mortgage. "The court will assign an additional $2,769 to him (the sum which had been due as the old mortgage) as the imputed income to this asset."

Second, the court noted that a departure from the guideline amount can be justified by special circumstances suggesting that application of the guideline formula would be "unjust or inappropriate."[6] Here, the court found the guideline formula inappropriate because (1) one of the children had previously attempted suicide and is in need of counseling; and (2) Hardesty has no visitation with his children. The court did not, however, order that such counseling occur.

The court then specified that the child support order would be modified to $1,561,[7] with that amount apportioned "$1,040 for the younger child, and $520 for the elder child."

I

As explained in *County of Tulare v. Campbell* (1996) 50 Cal.App.4th 847, 850, "'[T]he trial court's determination to grant or deny a modification of a support order will ordinarily be upheld on appeal unless an abuse of discretion is demonstrated.' [Citation.] Reversal will be ordered only if prejudicial error is found after examining the record of the proceedings below. [Citation.]"" Moreover, in reviewing such an order "[w]e do not reweigh the evidence or reconsider credibility determinations. (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518.) '[A] reviewing court, should not disturb the exercise of a trial court's discretion unless it appears that there has been a miscarriage of justice.' (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)" (*In re Marriage of Dandona & Araluce* (2001) 91 Cal.App.4th 1120, 1126.)

---

[6] Section 4057 provides in pertinent part, "(a) The amount of child support established by the formula provided in subdivision (a) of Section 4055 is presumed to be the correct amount of child support to be ordered. [¶] (b) The presumption of subdivision (a) is a rebuttable presumption affecting the burden of proof and may be rebutted by admissible evidence showing that application of the formula would be unjust or inappropriate in the particular case, consistent with the principles set forth in Section 4053, because one or more of the following factors is found to be applicable by a preponderance of the evidence, and the court states in writing or on the record the information required in subdivision (a) of Section 4056. . . ."

[7] We don't know where the extra dollar came from either.

Leva's defense of the court's decision in this case rests primarily on its conclusion Hardesty was not credible. And in fact, the court made that finding in very explicit terms, and we accept it. However, we cannot accept Leva's assertion that the court's credibility determination demonstrates, in turn, an implicit conclusion that Hardesty was lying *about his current income*. To the contrary, the court made a "determination" that Hardesty's earned income was the amount he claimed on his income and expense report.

Because that income level was also supported by Hardesty's most recent tax return, the court's adoption of that amount was supported by substantial evidence. "A parent's gross income, as stated under penalty of perjury on recent tax returns, should be presumptively correct." (*In re Marriage of Loh* (2001) 93 Cal.App.4th 325, 332.) Once Hardesty's most recent tax return had been placed in evidence, the burden shifted to Leva to offer evidence sufficient to overcome its presumptive correctness. In this case, however, Leva's evidence on the point was anecdotal, and largely outdated, as her knowledge of Hardesty's lifestyle had been chiefly gleaned during the period in which they shared custody. And that period ended in 2002.

As a consequence, we cannot infer, as Leva would have us do, that evidence of Hardesty's "lifestyle" must have caused the court to conclude his true income in 2006 was substantially higher than he claimed.[8] Because Hardesty's income tax return qualified as presumptive evidence of his income, we are stuck with the $2,352 number the court expressly adopted.

II

The court's decision to award support in excess of the amount derived by simply applying the guideline formula set forth in Family Code section 4055[9] to

[8] Leva contends that "[w]hile the Appellant would have the Court believe his only income was $2,352, that was not true. His lifestyle far exceeds that amount and any reasonable person with experience with these types of matter[s] would discern the same from his declaration. . . ."

[9] All further statutory references are to the Family Code.

Hardesty's earned income was specifically justified in two alternative ways. First, the court determined it was appropriate to "impute" income based upon the fact Hardesty owned his home free of any mortgage. The court believed Hardesty had retired his mortgage, rather than invest available funds in an income-producing asset as part of a plan to "insulate" himself from his child support obligation. The court specifically relied on *In re Marriage of Williams* (2007) 150 Cal.App.4th 1221, 1239 ["the trial court has the discretion to impute a reasonable rate of return on the supporting parent's underutilized or non-income producing investment assets in order to calculate guideline child support in the best interests of the child."].)

In other words, the court implicitly concluded that Hardesty had elected to utilize *funds which would otherwise have been available to generate income*, to pay off his mortgage instead. Unfortunately, the court had no evidence that Hardesty had actually done that. The court's only evidence was that Hardesty's mortgage had been approximately $300,000 *in 1993*, when the parties divorced, but was paid off *by 2002*. The term, interest rate, or monthly amount paid *prior* to 1993 does not seem to appear in the record.

In short, the court had no information regarding the terms of the mortgage (other than the monthly payment) and thus no basis to conclude Hardesty had retired the mortgage balance any earlier than he was obligated to by its terms. There was simply no evidence that Hardesty had invested any additional money, beyond his required payment, to accelerate the payment of mortgage principal.

Because there was no evidence that Hardesty had made any extraordinary effort to pay down his mortgage, there was nothing to suggest he had engaged in any scheme to "insulate" himself from child support by doing so.[10] Nonetheless, the court chose to "impute" income to Hardesty based upon its assumption he had engaged in such

[10] In fact, whatever other failings Hardesty has exhibited as a father, even Leva agreed he had always paid his child support in a timely fashion.

a scheme, and should have chosen instead to "invest" his available funds into some other "income-producing" asset. The court then decided the proper amount of income to "impute" was $2,769 per month, the amount Hardesty had been obligated to pay on his mortgage back in 1993.

We conclude the court erred in doing so. Significantly, the appellate court in *Williams*, the case relied upon by the trial court, *rejected* the notion of imputing income based upon a parent's ownership of his or her primary residence. While the court felt it was proper to impute income based upon a parent's ownership of *other* significant assets, it concluded "home equity" was not a proper basis for doing so.

Quoting from *In re Marriage of Henry* (2005) 126 Cal.App.4th 111, 119, the *Williams* court explained that "the broad definition of income set forth in section 4058 was not limitless and did not 'reach so far as to include the increase in equity of a parent's residence, forcing the parent to sell or refinance the home in order to make court-ordered support payments.'" (*In re Marriage of Williams, supra*, 150 Cal.App.4th at p. 1242.)

The *Williams* court acknowledged that in certain special circumstances, a deviation from the rule might be justified, and cited *In re Marriage of De Guigne* (2002) 97 Cal.App.4th 1353, as an example of such circumstances. In *De Guigne*, the father owned a palatial inherited estate, worth over $20 million. The estate included not only the house, but also 47 acres of highly valuable property. The estate had been the family residence prior to the divorce. After the divorce, the court determined the guideline amount of support, based only on the father's income, was less than $5,000 per month – not nearly enough to allow the children to share in the pre-divorce (and the father's current) lifestyle. The court consequently concluded a departure from the guideline amount was warranted, and ordered that child support be set at $15,000 per month. The court noted that father could generate the income necessary to satisfy that amount by selling 40 acres of the property surrounding the family estate, while still retaining the

home and seven acres for himself. The appellate court agreed, noting that "selling 40 acres of the property and investing the proceeds could yield sufficient income to shield the children from the full financial impact of the divorce, yet allow [the father] to retain his ancestral home on seven and one-half acres of land." (*Id.* at p. 1364.)

But of course, this case bears no significant resemblance to *de Guigne.* First, in this case, there is no evidence that Hardesty is actually enjoying a lifestyle better than that of his children. To be sure, there is evidence he is enjoying a lifestyle *better than that of most people who earn his income*, specifically because he lives in what Leva describes as a large and "immaculate" home. But there is no evidence establishing that home is significantly better than the one occupied by Leva and the children. And second, while the order in *de Guigne* implicitly required the father to sell a portion of the land included in his family estate, it explicitly eschewed any requirement that he would have to either sell or encumber his home or the seven acres surrounding it.

In this case, by contrast, the court's order – which equated Hardesty's lack of a mortgage payment with "income," and thus significantly increased his child support obligation over what a person of his *actual* income might be expected to afford– essentially obligated him to sell or re-mortgage his home. That was error.

III

The court also rationalized a departure from the guideline amount based upon two other "special circumstances." However, neither cited circumstance supports the order in this case. The court first held that a departure is warranted because the older child (the son) needs "counseling" due to an apparent suicide attempt *which had taken place five years earlier* in 2002.

However, there was no evidence offered concerning the son's current emotional state at the time of the court's order *in 2007*, let alone any expert testimony supporting the conclusion that the son was still in need of such counseling as of that time;

nor was there any evidence the son was, or would be actually be, participating in such counseling.

Moreover, the terms of the court's order appear to belie the rationale, since the order specifies that the *daughter* is entitled to twice as much in support per month as the son.[11]

In any event, even assuming the parties' son continued to have a special need for counseling, the court acted improperly in addressing that issue as part of the regular child support calculation. Instead, to the extent the court determines that a child has "special needs," the court may make an order of "additional child support" pursuant to section 4062. The amount of such "additional child support" must then be separately calculated in accordance with section 4061. There is no evidence that was done in this case.

The only other special circumstance mentioned is the fact Hardesty has no visitation with the children whatsoever. Arguably, this could justify additional support on the ground that Hardesty, as a "no-contact" father, would incur none of the incidental expenses of contact with his children (no need to maintain room for overnight visits, no extra snack foods, dinners out, random clothes and gift purchases, etc.).

But, the calculation of the basic guideline amount necessarily includes the amount of time spent with the children by each parent. (§ 4055.) As explained in section 4057, a departure from that guideline amount based upon the amount of time each parent spends with the child is warranted only when "[a] party is not contributing to the needs of the children *at a level commensurate with that party's custodial time*." (§ 4057, subd.

[11] This division of the support amount may represent an effort to comply with section 4055, subdivisions (b)(4) and (b)(8), which requires that an award of child support in cases of multiple children be allocated in a specific way. When the couple has two children, the proper amount of child support is equal to 1.6 times the amount of child support which would be ordered for only one child. The child support is then required to be allocated accordingly – the younger child is allocated the original share, and the elder child is allocated the additional ".6" of a share. That way, when the elder child becomes too old to qualify for child support, the younger child continues to receive an amount equal to what a single child would have been entitled to. In this case, however, the allocation does not quite match that statutory requirement. The younger child was allocated twice as much as the elder.

(b)(4), italics added.) In this case, because Hardesty's "custodial time" is zero for purposes of the guideline calculation, we cannot understand how he might be contributing to the needs of his children less than would be expected.

We know of only one case in which a father's lack of visitation was claimed as a "special circumstance" which warranted increased child support. In *Brothers v. Kern* (2007) 154 Cal.App.4th 126, the trial court justified a departure from the guideline support amount on several bases, including the fact that father, who was incarcerated, "would no longer be contributing support via visitation." (*Id*. at p. 137, italics added.) However, the court did not explain whether it was speaking of potential financial or potential emotional support which is presumed lost by the lack of visitation, and the appellate court did not provide any clarification. To the extent it means the former, we have addressed the issue above; to the extent it means the latter, we can only comment that child support should not be treated as, in effect, "damages" to compensate the child for a parent's emotional detachment.

The order is reversed. Hardesty is to recover his costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

ARONSON, J.